

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO 2002 DEC 23 PM 2: 07

Civil Action No.

02-m-2394(mjw)

JAMES R. MANSPEAKER
CLERK

BY _____ DEP. CLK

Scott Pivonka,
and
John Tottleben, individually,

Plaintiffs,

v.

CENTRAL GARDEN & PET COMPANY,
a Delaware Corporation,

NYLABONE CORPORATION,
a New Jersey Corporation,

and

TFC PUBLICATIONS, INC.
a Delaware corporation

Defendants.

COMPLAINT AND JURY DEMAND

Plaintiffs Scott Pivonka and John Tottleben, through their attorney, Ramon L. Pizarro,
allege as follows:

NATURE OF THE ACTION

1. This is an action for patent infringement arising under the patent laws of
the United States of America, Title 35, United States Code, and in particular, in violation
of 35 U.S.C § 271, et seq.

JURISDICTION AND VENUE

2. This is an action arising under the Acts of Congress relating to patents, 35 U.S.C. §§ 271, and 282-285.
3. This Court has jurisdiction over the claims set forth below pursuant to 28 U.S.C. §§ 1331 and 28 U.S.C. §§ 1338(a) & (b), 15 U.S.C. §§ 1121, and this Court's pendant jurisdiction. Venue is proper in this district under 28 U.S.C. §§ 1391(c) and 1400. The patent infringement alleged hereunder has been carried out in the United States and within the District of Colorado, as well as related acts complained of herein.

THE PARTIES

4. Plaintiffs, Scott Pivonka and John Tottleben ("Plaintiffs"), have been residents of Colorado during all times relevant hereto.
5. Defendant Central Garden & Pet Company ("Central"), upon information and belief, is a Delaware corporation having a principal place of business at 3697 Mt. Diablo Blvd., Suite 310, Lafayette, California 94549.
6. Defendant Nylabone Corporation ("Nylabone"), upon information and belief, is a New Jersey corporation having a principal place of business at One TFH Plaza Third and Union Avenue, Neptune City, NJ 07753.
7. Defendant T.F.H. Publications, Inc. ("TFH"), upon information and belief, is a

Delaware corporation having a principal place of business at One TFH Plaza
Third and Union Avenue, Neptune City, NJ 07753.

8. Based on information and belief, TFH and Nylabone are wholly owned subsidiaries of Central.
9. Defendants have been selling in Colorado, through retailers, collapsible pet carriers that fall within the scope of the claims of the patents owned by plaintiffs.

THE PATENTS-IN-SUIT

10. The first patent-in-suit is United States Letters Patent No. 6,216,638 (the '638 patent) titled "COLLAPSIBLE PET CARRIER" which was issued on April 17, 2001, to plaintiffs, Scott Pivonka and John Tottleben, based on application serial number 09/323,423, filed June 1, 1999. A copy of the '638 patent is found in Exhibit A attached hereto. Plaintiffs are the current owners of the entire right, title and interest in the '638 patent.
11. The second patent-in-suit is United States Letters Patent No. 6,408,797 (the '797 patent) titled "COLLAPSIBLE PET CARRIER" which was issued on June 25, 2002, to plaintiffs, Scott Pivonka and John Tottleben, based on application serial number 09/825,396, filed April 3, 2001. A copy of the '797 patent is found in Exhibit B attached hereto. Plaintiffs are the current owners the entire right, title and interest in the '797 patent.

BACKGROUND

12. Plaintiffs conceived and developed the collapsible pet carrier as described in and the '638 and '797 patents.
13. In early February of 2001, Plaintiffs informed defendants Central, TFH, and Nylabone of the fact that they had been notified that they were going to be issued a patent on a collapsible pet carrier, and enclosed the patent drawings of their pet carrier for their analysis, and invited defendants to enter into licensing discussions. A copy of the February 2001 communication is found in Exhibit C attached hereto.
14. The notice materials were forwarded to defendants' attorneys, Hayes Soloway, who responded that further analysis was necessary.
15. On March 19, 2001, plaintiffs provided defendants' attorneys with copies of the patent drawings and the allowed claims, and informed defendants' attorneys that a continuation application had been filed. A copy of the March 19, 2001, communication is found in Exhibit D attached hereto.
16. A copy of the allowed claims and application drawings were provided to defendant's attorney, Steven J. Grossman of Hayes Soloway, who on March 22, 2001, asserted that defendants would not entertain discussing whether a license from plaintiffs was needed.
17. On May 2, 2001, plaintiffs mailed a copy of the issued '638 patent to defendants and again notified defendants of the fact that continuation application had been

filed. A copy of the May 2, 2001, communication is found in Exhibit F attached hereto. Defendants responded to plaintiff's demands with defendant's letter of July 17, 2001, attached hereto as Exhibit G.

18. After noticing the continued exploitation of the collapsible pet carrier invention, in early September 2001, plaintiffs notified various major retailers of the '638 patent.
19. On September 21, 2001, defendants' attorney outlined the communications that had transpired between the parties and asserted that it was their opinion that the '638 patent was limited to the use of what had been referenced as item 37 in Figure 1 of the '638 patent, and that defendants' did not infringe on the '638 patent on the grounds that the defendants' devices did not include this item. A copy of defendants' attorney September 2001 communication is found in Exhibit H attached hereto.
20. Through a letter dated September 26, 2001, plaintiffs informed defendants' attorneys that defendants' interpretation of the claims was in error, and urged defendants to seek a second opinion. A copy of the September 26, 2001, communication is found in Exhibit I attached hereto.
21. Defendants ignored plaintiffs' position as to the erroneous interpretation.
22. Defendants disregarded plaintiffs' notice regarding the filing of a continuation application.
23. On June 25, 2002, the '797 patent issued to plaintiffs.
24. At least since April 17, 2001, defendants have continued to distribute, license,

market, make, use or sell collapsible pet carriers in Colorado under the trademark "Fold-Away Pet Carrier."

25. The "Fold-Away Pet Carrier" infringes one or more of the claims of the '683 or '797 patents. A copy of sale materials showing a collapsible pet carrier sold in Colorado by defendants or its agents is shown in Exhibit J.
26. Defendants Nylabone and TFH, as subsidiaries, are under the substantial control of Central, and due to notification by plaintiffs, Central had knowledge of the patents in suit and induced the direct infringement of the patents in suit by Nylabone and TFH.

COUNT I

(Infringement of the '638 Patent)

27. Plaintiffs reaffirm and re-allege each and every allegation set forth in paragraphs 1 - 26, inclusive, and incorporate them herein by reference.
28. Defendants have been, and are, directly or indirectly infringing one or more claims of the '638 patent in violation of 35 U.S.C. § 271(a), (b), (c) and/or (f), by making, using, offering to sell or selling, and/or causing others to make, use, sell or offer for sale collapsible pet carriers as claimed in the '638 patent.
29. Defendants have derived and received, and in the future will receive, gains, profits, and advantages from the infringement of the '638 patent in an amount to be proven at trial.

30. Plaintiffs have been damaged in a manner that cannot be fully measured or compensated in economic terms and for which there is no adequate remedy at law.
31. The actions of defendants have irreparably harmed and will continue to irreparably harm plaintiffs' potential to license, market, reputation, and good will unless defendants' infringing acts are enjoined.
32. As set out above and after reasonable opportunity for investigation or discovery, plaintiffs expect to establish that defendants knew of plaintiffs' patent rights under the '638 patent, and yet willfully and intentionally continued their infringement.
33. After reasonable opportunity for investigation or discovery, plaintiffs expect to establish that all defendants acted in concert in the continued, willful infringement of the '638 patent.
34. This is an exceptional case under 35 U.S.C. § 285, entitling plaintiffs to recover reasonable attorney's fees and other relief.

COUNT II

(Infringement of the '797 Patent)

35. Plaintiffs reaffirm and re-allege each and every allegation set forth in paragraphs 1 - 34, inclusive, and incorporates them herein by reference.
36. Defendants have been, and are, directly or indirectly infringing one or more

claims of the '797 patent in violation of 35 U.S.C. § 271(a), (b), (c) and/or (f), by making, using, offering to sell or selling, and/or causing others to make, use, sell or offer for sale collapsible pet carriers as claimed in the '797 patent.

37. Defendants have derived and received, and in the future will receive, gains, profits, and advantages from the infringement of the '797 patent in an amount to be proven at trial.
38. Plaintiffs have been damaged in a manner that cannot be fully measured or compensated in economic terms and for which there is no adequate remedy at law.
39. The actions of defendants have irreparably harmed and will continue to irreparably harm plaintiffs' potential to license, market, reputation, and good will unless defendants' infringing acts are enjoined.
40. As set out above and after reasonable opportunity for investigation or discovery, plaintiffs expect to establish that defendants knew of plaintiffs' patent rights under the '797 patent, and yet willfully and intentionally continued their infringement.
41. After reasonable opportunity for investigation or discovery, plaintiffs expect to establish that all defendants acted in concert in the continued, willful infringement of the '797 patent.
42. This is an exceptional case under 35 U.S.C. § 285, entitling plaintiffs to recover reasonable attorney's fees and other relief.

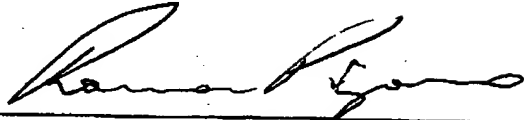
PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that the Court enter an Order for Judgment as follows:

1. Defendants, their agents, servants, employees, assigns, successors in interest, and all parties in privity therewith be preliminarily and permanently enjoined from the continued infringement of the '638 and the '797 patents. Defendants, their agents, servants, employees, assigns, successor in interest, and all parties in privity with them be enjoined preliminarily and permanently enjoined from making the misrepresentations complained of herein, or similar misrepresentations.
2. Defendants be required to account and pay to Plaintiffs for all damages resulting from Defendants' unlawful conduct.
3. Plaintiffs be awarded treble damages because of the knowing, willful and wanton nature of Defendant's conduct.
4. This case be adjudged an exceptional case.
5. Plaintiffs be awarded attorney fees.
6. Plaintiffs be awarded pre-judgment interest and costs.
7. Plaintiffs be awarded such other relief as is justified by this case.

PLAINTIFFS HEREBY REQUEST A TRIAL BY JURY.

Respectfully submitted on this 21st day of December, 2002,

A handwritten signature in black ink, appearing to read "Ramon L. Pizarro", written over a horizontal line.

Ramon L. Pizarro, #21400
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